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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JACQUELINE GANTNER,

Plaintiff and Appellant,

v.

LEMONADE RESTAURANT
GROUP, LLC,

Defendant and Respondent.

B272160

(Los Angeles County
Super. Ct. No. BC533180)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory W. Alarcon, Judge. Reversed and remanded.

Shegerian & Associates, Carney R. Shegerian and Jill P. McDonell for Plaintiff and Appellant.

Gordon & Rees, Don Willenburg, Stephen E. Ronk and Jennifer L. Ghosland for Defendant and Respondent.

SUMMARY

Plaintiff Jacqueline Gantner sued her former employer, Lemonade Restaurant Group, LLC, alleging gender-pregnancy discrimination, disability discrimination, failure to accommodate, failure to engage in the interactive process, wrongful termination and retaliation in violation of public policy. She appeals after judgment was entered on special verdicts in favor of defendant on all claims.

Plaintiff contends the trial court committed prejudicial error in its instructions to the jury in response to jury questions during deliberations. She contends the jury was confused about the number of votes necessary to answer questions on the special verdict form, and acted on the belief that the lack of nine “Yes” votes on a question – such as whether gender and/or pregnancy discrimination was a substantial motivating factor in plaintiff’s termination – meant that the jury should answer “No.”

We conclude that the record and the juror declarations plaintiff presented with her new trial motion demonstrate an irregularity in the proceedings of the jury that materially affected plaintiff’s substantial rights. We must reverse the judgment and remand for a new trial.

FACTS

1. The Nature of the Case

Because there will be a new trial, we need not say much about the testimony or documentary evidence presented to the jury. The nature of the case may be simply described.

Defendant hired plaintiff in August 2009. Plaintiff worked in various positions until her termination in January 2013. She began as an assistant manager at defendant’s Beverly Boulevard location, and a few months later became general manager at the Venice “flagship” store. She also began to work in the catering side of the

business, and in May 2010 she left the Venice store and began managing two smaller stores and handling catering orders. She became corporate catering manager, focusing exclusively on catering, in September 2012. In October 2012, defendant removed her from the catering position and employed her as its brand representative at a Los Angeles International Airport location operated by a licensee. In January 2013, she was terminated.

Plaintiff testified that in April 2012, she told defendant she was having panic attacks and needed to take some time off (which she did). She testified that she reported wage and hour violations to defendant, and complained about sexist conduct and pay inequities with her male counterparts. Plaintiff asserts she was fired because of these complaints and because she was pregnant. Defendant's position was that plaintiff was a good employee until the summer of 2012, when her performance and behavior seriously declined, with complaints from customers and coworkers and instances of questionable judgment, and that no one employed by defendant even knew of plaintiff's pregnancy when she was fired.

Trial began on January 12, 2016, and the jury began deliberations on Friday, February 5, 2016.

2. The Special Verdict Form

The special verdict form required "Yes" or "No" answers to several critical questions, including these:

No. 1: "Was [plaintiff's] gender and/or pregnancy a substantial motivating reason for [defendant's] decision to terminate her employment?"

No. 5: "Was [plaintiff's] disability a substantial motivating reason for [defendant's] decision to terminate her employment?"

No. 10: "Did [defendant] fail to provide reasonable accommodation for [plaintiff's] disability?"

No. 17: “Were [plaintiff’s] complaints of or experience of discrimination, harassment, and/or retaliation based on gender/pregnancy and/or disability and/or her complaints of or experience of unequal or unfair wage payments or practices, a substantial motivating reason for [defendant’s] decision to terminate [plaintiff’s] employment?”

No. 20: “Were [plaintiff’s] complaints or opposition to [defendant] about discrimination and/or harassment based on gender/pregnancy and/or disability a substantial motivating reason for [defendant’s] decision to discharge [plaintiff]?”

3. The Jury’s Questions and the Instructions

Before deliberations began, the trial court instructed the jury that “[a]ll 12 of you must deliberate on and answer each question. At least nine of you must agree on an answer before all of you can move on to the next question.” And, “[y]ou must vote separately on each question. Although nine or more jurors must agree on each answer, it does not have to be the same nine for each answer. Therefore, it is important for each of you to remember how you voted on each question so that if polled, each of you will be able to answer accurately on how you voted.” (Plaintiff’s counsel reiterated in his closing that “all that is required is that 9 of 12 of you agree on an answer, whatever that answer may be, and then you move on to the next question.”)

During deliberations on Monday, February 8, 2016, in the afternoon, the jury asked two questions: The first was, “We do not have a majority vote on question # 1, but have reached an agreement on all others. How do we proceed? Can we just base our conclusion of [*sic*] the other questions?” This colloquy between the judge and the jury ensued:

“[THE COURT:] Not positive that I know what that means, but I think what I am hearing is that you couldn’t get

a majority as to -- there was a disagreement as to the first question, but you have agreed on the other questions?

“Juror Number 11 [(the foreperson)]: Correct.

[¶] . . . [¶]

“THE COURT: If it is a disagreement and if you don’t have nine, that sounds li[ke] a disagreement if that’s the case.

“Juror Number 11: Correct.

“THE COURT: What happens? [¶] What happens is, I see if there’s something I can do to help, maybe with instructions, answering questions, even maybe additional argument and I ask you if that will help. [¶] If you all say no, or if there’s no indication that anything will change, then that count -- that count will be that you basically can’t decide. [¶] So that’s what happens. Okay. So are we okay with that first one? [¶] Okay. The second question seems to me is related to the first one, but I am not sure.”

The second question was: “Also, the plaintiff has the burden of proof and has achieved a majority on a question, do we need to deliberate further?” The court continued:

“I mean, the answer is, no, unless it is a situation like number 1 where you -- you -- you know, I make inquiry if there’s something I can do. If you haven’t had a majority, you don’t need to deliberate further. [¶] . . . [¶]

“Juror Number 3: That one question drives the answers for other questions.

“THE COURT: Now, when you say ‘that question,’ do you mean the one the page 1?

“Juror Number 3: Yes.

“THE COURT: . . . (Reading:) If the answer is yes, then answer question two. [¶] Right? [¶] If you answer no, go over to part B. (As read.) [¶] So doesn’t that -- yes?

“Juror Number 11: My question is, and I wanted to be careful to word this safely, if the plaintiff has the burden of proof in this case, which is our understanding, yet has not achieved the necessary nine votes on a single question, for example, does that mean the plaintiff has failed to achieve her case and purpose must we have nine votes that vote against the plaintiff to be finished, or is the fact that the plaintiff has not achieved nine votes in her favor in [effect] a no and are we done?

“THE COURT: The first answer is the right one. The first one, of course. [¶] Let me just put it to you this way. If you went to a carnival and you saw somebody with a hammer and they were hitting the hammer to see if it hits the bell, that’s sometimes what I use a lot with jurors is that -- that’s the question. The plaintiff has the hammer. The question is, have they made it up to the bell or whatever the standard is, preponderance of the evidence, clear and convincing, whatever it is. [¶] If they haven’t achieved that, you don’t have to go the other way which is what you were suggesting. [¶] Okay. I am getting idea looking at you, well, I am not sure that everybody is okay with that -- those answers? [¶] . . . [¶]

“Juror Number 11: If I can just rephrase it one more time. [¶] . . . [¶] I am the dumbest one here, so I need to hear this again. [¶] If the plaintiff --

“THE COURT: Has the burden of proof.

“Juror Number 11: -- needs to achieve nine votes on a question and falls short of those nine votes on a question, are we done deliberating on that question because, in effect, it has gone against her, or must we say that we have nine votes that in this instance go against the plaintiff?

“THE COURT: Just like that hammer trying to hit it up the thing or temperature going up to 98.6, if it doesn’t get there, it doesn’t get there.

“Juror No. 11: So the first one.

“THE COURT: Are we okay, everybody? I am looking at every body and I am getting sort of mixed. [¶] You don’t have to have a majority that says that somebody has not proved the case. [¶] The question is, do you have a majority of nine that says they proved the case based on the standard that I instructed you? [¶] Okay. I am looking at everybody. [¶] Okay. We will be right here. Nobody is leaving. [¶] If you have any questions, just please write it down.”

The jurors then recessed for the evening.

The next morning, February 9, plaintiff filed a brief “regarding basically, giving a dynamite *Allen* charge”¹ The court refused, because “the jury hasn’t said they are hung,” but the court had “no problem giving them the burden of proof again” The court elaborated: “The only thing I thought is just looking at their faces, I thought maybe I should give the instruction again. It’s just giving the burden of proof. [¶] As I heard it, the jury was -- some jurors thought that both sides had a verdict [*sic*]; that the plaintiff had to prove their case and the defense had to disprove their case and that was what I was trying to clarify. [¶] It seems to me, the burden of proof instruction resolves that.”

Plaintiff’s counsel said: “My concern is that it seemed that the jury, they assumed if there’s not a finding of nine jurors for yes that they would automatically assume that means no. That was my concern.” The court responded, “I -- maybe, but that’s not what they

¹ *Allen v. United States* (1896) 164 U.S. 492.

said. They said did they need nine jurors to say no. That's what they said. [¶] Anyway, I don't have a problem."

The court then re-read three instructions to the jury on the burden of proof. These included, "You must answer the questions on the verdict form in the order they appear. After you answer a question, the form tells you what to do next. At least nine of you must agree on an answer before you can move on to the next question."

That afternoon, plaintiff moved for a partial mistrial on the gender/pregnancy discrimination claim, "essentially the first two questions," based on "the jury's inability to reach a verdict on that particular claim" the previous day. The court denied the motion, stating the jury "didn't say they were deadlocked."

4. The Verdict

The next day (February 10), in the afternoon, the jury reached a defense verdict. The verdict was read.

Defendant requested the jury be polled, and the clerk began the polling:

"THE CLERK: Okay. [¶] Part A. Question one on the verdict form as to whether or not [plaintiff]'s gender and/or pregnancy was a substantial motivating reason for [defendant] to terminate her, the answer on the verdict form is 'No.' [¶] Is there any juror whose verdict would have been different? [¶] Your Honor, there are no hands. I have a 12-0 count.

"Juror Number 4: Read that again.

"THE CLERK: The answer on the verdict form as to question number one in part A is 'No.' [¶] Is there any juror whose verdict would have been different?

"Juror Number 11: Are you asking whether that is the correct answer that the jury --

“THE COURT: The goal is to see if the people agreed with that or disagreed. That’s what [the clerk] is doing is she’s getting a count if there are any people that disagreed to it.

“THE CLERK: Is there any juror whose verdict would have been different than ‘No,’ as indicated on the verdict form? [¶] Okay. Juror Number 4 – three and four.

“Juror Number 3: Just a minute.

“Juror Number 7: Are you asking if I answered yes?

[¶] . . . [¶]

“Juror Number 9: The question is very confusing to all of us.

“THE COURT: The whole reason that polling is done is to see if nine jurors agree. [¶] Sounds to me right now, I am getting the idea that four jurors disagree. So there aren’t nine jurors that disagree -- that agree.

“Juror Number 11: Your Honor, may I --

“THE COURT: Tell you what I will do. Why doesn’t the jury go back in the jury room and talk and then let me know.”

After a pause in the proceedings, the court went back on the record with the jury and continued:

“The verdict was read and I believe [the clerk] is going to poll the jury.

“THE CLERK: To the jurors, as to Part A, Question number one on the verdict form the answer on the verdict form is ‘No.’ [¶] Is there any juror who would have voted differently? [¶] Your Honor there are no hands. I have 12-0 count.”

The polling continued, with the clerk asking each time, “is there any juror who would have voted differently?” and with a 12-0 count on each question.

Plaintiff’s counsel requested a sidebar before the jury was discharged. Counsel was concerned “that the jury did not have firm understanding of what it needed to achieve in terms of a vote of nine for yes or no, which is compounded by the fact that they consistently referred to quote, unquote majority. [¶] So we would just again reassert our motion that it was a deadlocked jury and seek a mistrial and also request, if it helps this, to have the jurors polled individually just to alleviate any type of confusion.”

The court replied, “They were polled individually,” and plaintiff’s counsel said: “Well, what I mean by that, Your Honor, specifically each juror asked what their vote was but, we will submit to the court. But that, just for the record, plaintiff would move again for a mistrial.” The court denied the motion.

Judgment on the special verdict was entered on March 8, 2016.

5. Postjudgment Proceedings

Plaintiff sought a new trial on 12 grounds, including irregularity in the proceedings of the jury.

Plaintiff contended the jury was “admittedly confused by whether they needed nine votes for both a ‘No’ vote and a ‘Yes’ vote on the special verdict form,” and the court incorrectly stated the law when it said, “You don’t have to have a majority that says that somebody has not proved the case. The question is, do you have a majority of nine that says they proved the case based on the standard that I instructed you?” Plaintiff further argued that juror affidavits revealed “that the jury did not reach a defense verdict on Question No. 17[.]”

To support its new trial motion, plaintiff submitted declarations from three of the jurors, all stating in substance that seven jurors voted “Yes” on question No. 17, but the foreperson wrote “No” and told them not to raise their hands when asked if they disagreed with the verdict. In opposition to the new trial motion, defendant submitted declarations from two other jurors, one of them confirming that at one point the jury was split 7-5, but before rendering the verdict reached a unanimous agreement “in favor of checking ‘No,’ ” and the other stating that “the jury unanimously agreed on all questions in the special verdict form.”

The court denied defendant’s motion for a new trial, and this appeal followed.

DISCUSSION

We conclude the record demonstrates an irregularity in the proceedings of the jury which denied plaintiff a fair trial.² (See Code Civ. Proc., § 657, subd. 1.)

We recount the details below. In summary, the jury apparently believed that if there were not nine votes in favor of answering “Yes” to any question on the special verdict form, then they should answer that question “No,” even though fewer than nine jurors agreed to answer the question “No.” The trial court had properly instructed the jury before their confusion arose that nine or more jurors must agree on each answer. After the jury reported their confusion to the court, the court attempted to explain that nine votes were required to answer any question. But the court stated several times, as described *ante*, that the faces of the jurors indicated they remained confused. And the juror declarations

² Because a new trial is required, we need not consider plaintiff’s additional contentions the trial court erred in its method of polling the jury and in the admission of certain evidence related to alcohol, drugs and sexual conduct.

demonstrate that the jury's misunderstanding continued to the end, and that the verdict form did not reflect the true verdict of the jury.

Three juror declarations demonstrate the irregularity that occurred in the jury room: that seven jurors voted "Yes" on question No. 17, but the foreperson (Juror No. 11) wrote "No," and told the jurors not to raise their hands when asked if they disagreed with the verdict. Thus:

Alberto Devora (Juror No. 6) stated:

"I, along with Ms. Muralles, Ms. Perez, Ms. Moss, Mr. Zamora, Mr. Chen, and Mr. Ochs, voted 'Yes' on Question No. 17.³ We talked about our frustration with the Foreperson still marked on the verdict form that the answer to Question No. 17 was 'No,' when we had seven versus five votes for 'Yes.' The jurors talked about how this did not make any sense. [¶] . . . There was confusion communicated by the jurors while the verdict was being read. After the first polling of the jurors where we were all sent back into the jury room, the Foreperson specifically instructed us in the jury room that we were not to raise our hand upon returning to the jury box. I followed such an instruction and did not raise my hand."

Felipe Zamora (Juror No. 3) corroborated Juror Devora, stating in his declaration: "The jurors voted 7-5 as 'Yes' versus 'No' in response to Question No. 17. However, the jurors discussed that they thought that a less than nine vote of 'Yes' meant a 'No' answer and thus checked off 'No' on the verdict form." Juror Zamora further confirmed the juror confusion during the initial polling, and stated that when the jury was sent back to the jury room, the jurors

³ In a supplemental declaration, Juror Devora clarified that he misidentified the names of two jurors who voted yes, and that instead of Mr. Chen and Mr. Ochs, he should have stated, "the sole Asian male juror and the remaining male juror."

were informed “specifically by the Foreperson that if we were not changing our initial vote, then to not raise our hand. When asked again by the Court, I did not raise my hand based on that understanding. I did not understand that the Court was inquiring as to whether I as an individual had voted ‘Yes,’ or, stated differently, that I voted differently from what was stated on the verdict form.” And: “If I was asked individually what my vote was, I would have answered ‘Yes’ for Question No. 17, as my vote for Question No. 17, along with six other jurors, was ‘Yes.’ ”

Rebecca Perez (Juror No. 9) similarly corroborated Jurors Devora and Zamora. She stated: “By the end of deliberation, we had not reached a vote of nine for ‘Yes’ on Question No. 17, instead only reaching seven votes for ‘Yes.’ We jurors discussed being unsure of how to proceed without the clarity we sought, but based on a collective understanding, assigned an answer of ‘No.’ However, only five jurors actually voted ‘No’ on Question No. 17, versus the seven that voted ‘Yes,’ but [the foreperson] marked off ‘No’ after discussing that there need not be nine for ‘No.’ I was one of the seven jurors who voted ‘Yes’ to Question No. 17.” Further: “When we were polled the first time, we jurors were asked to raise our hands if we would have answered differently. This led to several jurors looking around appearing confusing and several of us to raise our hand, including myself. The Judge sent us back to further deliberate, and we discussed this confusion back in the jury room. [The foreperson] told us that we were not to raise our hand to the polling unless we were now changing our prior vote.”

The two juror declarations submitted by defendant are not inconsistent with the accounts given by Jurors Devora, Zamora and Perez.

Lauren Thomas (Juror No. 7) states: “The jury spent a significant amount of time discussing Question No. 17 on the

verdict [form] regarding wrongful termination in violation of public policy. At one point during deliberation, the jury was split 7-5, with 7 jurors in favor of checking 'Yes' and 5 jurors in favor of checking 'No' as to Question 17. Prior to [rendering] the verdict, the jury reached a unanimous agreement of 0-12 on Question No. 17 in favor of checking 'No'. The final vote of 0-12 was relayed to the Court on the verdict form by checking 'No' to Question No. 17, and was reflected in open Court when the jurors were asked to raise their hands regarding the votes."

Thus, Juror Thomas corroborates Jurors Devora, Zamora and Perez on the 7-5 split on question No. 17, and further states that ultimately the jurors unanimously agreed "in favor of checking 'No.'" This is entirely consistent with Jurors Devora, Zamora and Perez, all of whom state they agreed to answer "No" – but under the mistaken impression that unless there were nine "Yes" votes, the answer to the question was "No." Juror Thomas does not deny that the jurors believed they had to answer "No" if there were not nine votes for "Yes," and she does not deny the foreperson told the jurors not to raise their hands when polled if they were not changing their initial vote.

Finally, Melissa Silva (Juror No. 2) states that several jurors "immediately reacted off of emotion when sent to deliberate," but over several days "put their emotional reactions aside," and before rendering the verdict, "the jury unanimously agreed on all questions in the special verdict form," and "no one" raised their hands when asked if they would have voted differently on any of the questions. Again, Juror Silva's declaration is not inconsistent with the others, and does not undercut the reliability of their declarations of confusion about how to complete the verdict form. And again, she does not deny the jurors thought the answer was "No" in the absence of nine votes for "Yes," and she does not deny

their accounts of what the foreperson (mistakenly) told the jurors to do when polled.

Defendant contends the juror declarations plaintiff submitted are “largely inadmissible because they are about the ‘effects’ on jurors ‘or the mental processes by which [the verdict] was determined,’ ” citing Evidence Code section 1150. That is the entirety of defendant’s argument on section 1150, with no references to the parts of the declarations it claims are inadmissible, and no analysis or citation of authority to support the claim. We may deem the argument forfeited, but it is in any event incorrect. The pertinent points in the declarations do not reflect “the mental processes by which [the verdict] was determined,” but rather “statements made” or “events occurring” in the jury room (§ 1150), resulting in a misstatement of the actual votes of the jury.

To recap: It is apparent to us that, despite the hard work of this jury after a long trial, the verdict form did not truly state the vote of the jury. The jury confusion is evident from the time the jury’s questions were first posed, with confusion apparent on jurors’ faces after the court’s attempted clarification. The confusion continued through the initial polling of the jury, where it became obvious that at least four jurors had not actually voted “No” on the first question. And the juror declarations confirm that the misunderstanding of the court’s instructions continued during the jury’s return to the jury room, with the foreperson specifically telling the jurors “that if we were not changing our initial vote, then to not raise our hand” during polling.

The evidence is uncontradicted, and the result is contrary to law. We are compelled to conclude there was an irregularity in the proceedings of the jury that materially affected plaintiff’s substantial rights, and a new trial is required.

DISPOSITION

The judgment is reversed and the cause is remanded for a new trial. Plaintiff shall recover her costs on appeal.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

ROGAN, J.*

* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.